DOCUMENT RESUME

ED 308 510 CS 211 908

AUTHOR Flocke, Elizabeth Lynne
TITLE "False" Ideas and the First Amendment: Judicial Interpretation of the Constitutional Protection for Opinion in Libel Cases.
PUB DATE Aug 89
NOTE 53p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (72nd, Washington, DC, August 10-13, 1989).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Constitutional Law; Content Analysis; *Court Doctrine; *Court Litigation; *Federal Courts; Journalism; *Legal Problems; *Opinions
IDENTIFIERS *First Amendment; *Libel; Supreme Court

ABSTRACT

To examine the status of opinion as protected speech, a study sought answers to three questions: (1) Is opinion protected under the constitution? (2) If protection exists for opinion, has it usurped the common law fair comment defense in libel litigation? and (3) How do the courts define opinion in the context of libel? Answers were sought in Supreme Court and lower court cases dealing directly or indirectly with opinion. Findings indicated an overwhelming belief by courts at all levels that opinion is protected under the constitution; showed the predominance of the use of the opinion rationale over fair comment; and revealed seven approaches used by judges to determine whether allegedly libelous statements are fact or opinion, the most common being the "Restatement" rationale, in which opinion is protected unless undisclosed libelous facts are implied or present. The study recommends that journalists consider two major factors in establishing guidelines for everyday use: the context of the publication or broadcast; and the nature of the words in the allegedly libelous statement. (Eight tables of data and 160 footnotes are included.) (SR)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED308510

"FALSE" IDEAS AND THE FIRST AMENDMENT:

JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL PROTECTION FOR OPINION IN LIBEL CASES

Elizabeth Lynne Flocke*

S.I. Newhouse School of Public Communications
Syracuse University
Syracuse, New York 13244-2100

* The author is grateful to the late Dale Spencer, professor of journalism at the University of Missouri-Columbia, for inspiring and guiding the research project on which this paper is based.

Paper presented to the annual meeting of the Law Division of the Association for Education in Journalism and Mass Communication, Washington D.C., 1989.

CS211908

BEST COPY AVAILABLE

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Elizabeth Lynne Flocke
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

"FALSE" IDEAS AND THE FIRST AMENDMENT:
JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL PROTECTION
FOR OPINION IN LIBEL CASES

The Supreme Court has said the First Amendment to the U.S. Constitution assures the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[1] Even libel, writing that damages an individual's reputation, "can claim no talismanic immunity from constitutional limitations," but "must be measured by standards that satisfy the First Amendment,"[2] the court declared in the 1964 New York Times v. Sullivan decision. In that most famous of libel cases, the court opened the constitutional umbrella of free speech over state libel laws.

The question of opinion is one portion of the libel landscape that has yet to be clearly and convincingly defined. If reputations can be ruined by vituperative opinion, should the courts not be allowed to temper such speech? On the other side, if the mere expression of ideas or opinions is punishable through costly libel suits, has the nation forsaken its "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"?[3]

This study sought to examine the status of opinion as protected speech.[4] It traced the opinion privilege from its fair comment origins through the interpretation by courts of all levels of the constitutional protection for opinion.

common law fair comment defense in libel litigation, and how courts determine opinion in libel cases.

Traditional legal research consists of analysis of cases, with emphasis on Supreme Court and other appellate cases because they are binding on lower courts. But the law is unsettled in the area of libelous opinion' therefore, lower court decisions are helpful to determine what is considered protected expression and why.

BACKGROUND AND SIGNIFICANCE OF THE STUDY

The Supreme Court declared in 1974 that, under the First Amendment, "there is no such thing as a false idea."[5] On the surface, the statement by Justice Lewis Powell appears to affirm the principle of the free marketplace of ideas that is the basis for the First Amendment. These sentences written by Justice Powell in Gertz v. Welch[6] launched a debate in the nation's courts over their meaning:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of facts. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on the public issues.[7]

If there can be no false ideas or opinions, then all opinions are protected by the First Amendment. This is the interpretation many state and federal courts have ascribed to the Gertz passage.[8] Even pernicious opinions should be checked only

interpretation many state and federal courts have ascribed to the Gertz passage.[8] Even pernicious opinions should be checked only by the competition of other opinions. Judges and juries are not to decide the worth of an opinion. But the passage reiterates that false facts do not advance society's interest in open debate on public issues.

The Supreme Court has offered little direct guidance as to the meaning of the passage. A principal problem is the fact that the passage in Gertz is dictum, meaning the statement had virtually nothing to do with the issues involved in Gertz. In fact, one of the few direct comments by a Supreme Court justice on the Gertz passage was a claim by Justice William Rehnquist that the court did not intend to "wipe out" the "rich and complex history of the struggle of the common law to deal with this problem."[9] The court has cited the passage in at least two cases since Gertz and may have reinforced it in a third.[10]

But even if the Gertz passage is taken--as it has been by many judges--to mean that no opinion can result in actionable libel, problems are numerous. If a statement of opinion has constitutional protection in libel suits, distinction between fact and opinion becomes vital. Despite attempts by judges to devise formulas, conditions, and tests to determine whether a statement is fact or opinion,[11] there is no clear-cut standard and the results are murky at best. Commentators and judges alike readily decry the distinction

as elusive, clumsy, and unreliable.[12]

Areas of unsettled libel law may be open mine fields for journalists who must be able to predict liability with some precision often with a split-second decision under deadline pressure. If journalists cannot predict what will be considered libelous, they may be overly cautious and "tend to make only statements which `steer far wider of the unlawful zone.'"[13]

REVIEW OF LITERATURE

Legal scholars have bemoaned the quandary of the fact-opinion area and in particular the attempts to distinguish between fact and opinion.[14] Some of them think the distinction is unnecessary.[16]

The inherent subjectivity of the language, Schauer believes,[17] creates problems that require a close look at "some unwarranted assumptions"[18]--first, that the domains of opinions and facts are distinct,[19] and second, that words have concrete meanings.

The determination of what is fact and what is opinion is made on the basis of the effect which the communication reasonably may be expected to have on its recipient, according to Sack.[20] The crucial difference between statements of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact. The

opinion may be in the form of a factual statement, but the context should make it clear whether the maker intended to assert an objective fact or only a personal comment upon the facts she or he had stated.[21]

Robert Webner[22] breaks the tests and formulas courts have applied to the fact/opinion distinction into three broad categories: the reader-oriented approach, the truth or falsity approach and the contextual analysis approach.

Franklin and Bussel[23] agree with Titus,[24] who called for an end to the "spurious distinction" between fact and opinion years before the constitutionalization of fair comment through New York Times v. Sullivan and Gertz. According to Franklin and Bussel, the courts can discard permanently the distinction between fact and opinion since the shift of burden of proof to the plaintiff in New York Times. The effect of the shift in burden of proof is that the defendant cannot be held liable for the publication of statements that cannot be proved false--what they call "nondisprovable statements."[25]

The shift of burden is derived from the holding in New York Times.[26] The requirement that the plaintiff prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"[27] would seem to require the prior or simultaneous determination that the statement in question was false, according to Franklin and Bussel. Requiring the plaintiff

to prove that the defendant was aware of the statement's falsity would make no sense if the statement was in fact true or could not be characterized as being either true or false.

The area of opinion and fair comment is one of doctrinal confusion caused by what Smolla refers to as a "pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications."[28]

METHOD

The study sought the answers to the following questions:

1. Is opinion protected under the constitution?
2. If protection exists for opinion, has it usurped the common law fair comment defense in libel litigation?
3. How do the courts define opinion in the context of libel?

Evidence for Question 1--Is opinion protected under the constitution?--was sought in two principal locations: interpretations of the First Amendment by the U.S. Supreme Court in cases dealing directly or indirectly with opinion and through the systematic survey of lower court opinion cases.

Answers to the second research question--Has the opinion privilege usurped the common law fair comment defense in libel litigation?--were sought in Supreme Court doctrine and its interpretations by lower courts.

The third research question--How courts define opinion in the context of libel litigation--was answered through data obtained from the cases in the study. Indicators of opinion definitions were sought through definitions actually given in the cases, the various tests offered by the different courts to determine if a statement is fact or opinion, and the frequency of use of the various tests.

An empirical examination of libel cases in which opinion or fair comment was used as a defense was conducted.[29] All fair comment/opinion cases published in Media Law Reporter[30] from 1977 to the cutoff date--Sept. 1, 1987--were examined to develop a data base for determining answers to the research questions.[31]

FINDINGS: SUPREME COURT DECISIONS AND OPINION

The New York Times v. Sullivan[32] decision incorporated the minority position that the fair comment privilege also protected false statements of fact so long as they were made honestly and without malice, for the public benefit, and with a good faith belief as to their truth.[33] The two key elements in the New York Times decision regarding opinion protection are that only false statements are libelous and the plaintiff must prove them. If a plaintiff has to prove a statement is false, a statement which cannot be proven true or false--such as an opinion--may not be the cause of action in a libel suit.

In Greenbelt v. Bresler,[34] the Supreme Court in 1970

extended the constitutional protection to statements that may appear to be damaging, but which are used as rhetorical hyperbole to strongly express an opinion and would not be taken literally by readers. The court also said that the newspaper was performing its legitimate function as a community newspaper in publishing reports of public debates or controversy.

The Supreme Court said in Letter Carriers v. Austin[35] that the use of words flung about in an economic or political controversy is protected because readers would not understand such name-calling as "traitor" literally, but as a strong feeling of contempt. Such words used in a "loose, figurative" sense to concentrate strong feeling or disagreement is expression of opinion, which, even in the most pejorative terms, is protected.[36]

In Gertz v. Welch,[37] a 1974 U.S. Supreme Court case considered by some courts as the fountainhead for the opinion privilege, the court declared that false ideas do not exist under the First Amendment.[38]

The use of the Gertz dictum by lower courts as a shield for opinion was directly and sharply attacked by two Supreme Court justices in 1982 in a dissent to denial of certiorari in an Oklahoma Supreme Court case.[39]

But two years later, the Supreme Court quoted the Gertz dictum with approval in Bose Corp. v. Consumers Union of the United States, Inc.[40] A fledgling opinion privilege

may have been bolstered indirectly by the court in two more recent cases, neither of which was an opinion case: Philadelphia Newspapers v.Hepps[41] and Flynt v. Falwell.[42]

In the 1986 Philadelphia Newspapers case, the court held that a private-figure plaintiff must demonstrate falsity of allegedly libelous material published by the media about a matter of public concern.[43] There are some cases in which truth and falsity are difficult to determine, and, in such cases, the 5-4 majority said the scales should tip in favor of free speech.[44]

A substantial portion of the Philadelphia Newspapers opinion concerned the protection of speech that cannot be proven false. In such cases, placing the burden of showing falsity on the plaintiff may cause the suit to fail "despite the fact that, in some abstract sense, the suit is meritorious," the court said.[45] Likewise, placing the burden of showing truth on the defendant may mean some defendants may lose even though the speech is true.[46] Either way, "the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false," the court said.[47]

Because of this dilemma, in a case in which the evidence is ambiguous and the burden of proof is the only determining factor as to who wins, "and where the scales are in such an uncertain balance," Justice O'Connor said, "we

believe that the Constitution requires us to tip them in favor of protecting true speech." Therefore, to ensure that "true speech on matters of public concern is not deterred," the court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[48]

Requiring the plaintiff to show falsity will "insulate from liability some speech that is false, but unprovably so," said O'Connor.[49] However, she added, quoting Gertz, "'the First Amendment requires we protect some falsehood in order to protect speech that matters.'"[50]

It is the nature of the speech that causes it to be protected. The speech in Hepps concerns the legitimacy of the political process and therefore "clearly matters."[51]

> To provide "breathing space for true speech on matters of public concern," the Court has been willing to insulate even demonstrably false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. We therefore do not break new ground here in insulating speech that is not even demonstrably false.[52]

The court appears to be protecting nondisprovable speech,[53] since such speech is not demonstrably false.

The holding in the 1988 Supreme Court decision in Flynt v. Falwell[54] concerns an emotional distress action, but the opinion contains several references to the area of opinion and other nondisprovable speech that may help define

the opinion privilege.

Jerry Falwell, the nationally known minister and public figure, sued Larry Flynt and Hustler magazine to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The trial court directed a verdict against Falwell on the privacy claim, and submitted the other two claims to a jury. The jury found for Flynt on the libel claim, but found for Falwell on the claim for intentional infliction of emotional distress and awarded $200,000 in damages.

The Supreme Court affirmed a jury verdict against Falwell because the parody could not "reasonably be understood as describing actual facts...or events."[55]

Also significant is the citation of the Gertz dictum in the court's unanimous opinion, which was written by Chief Justice Rehnquist, who had earlier criticized the dictum's interpretation by lower courts.[56] Rehnquist stated that the court has been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanction. Then he cited the Gertz dictum:

> The First Amendment recognizes no such thing as a 'false' idea. [Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)].[57]

Quoting from Justice Oliver Wendell Holmes' famous dissent in Abrams,[58] Justice Rehnquist said:

> "...the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market...."[59]

This reasoning reiterates the truth-seeking function of the First Amendment through its protection of the marketplace of ideas. False facts do not contribute to the marketplace, but because the First Amendment recognizes no false idea, all ideas are welcome.

"Outrageousness" in the area of political and social discourse has an "inherent subjectiveness" that would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, the court said.[60]

It is firmly settled, the court continued, that "the public expression of ideas may not be prohibited because the ideas are themselves offensive to some of their hearers."[61]

The court concluded that public figures and officials may not recover for intentional infliction of emotional distress without showing in addition that the publication contains a false statement of fact that was made with "actual malice."[62]

FINDINGS: LOWER COURTS AND OPINION

This study found that most lower courts are working under the assumption that the constitution protects opinion. More than two-thirds of the 219 opinion and fair comment cases studied accepted the Gertz dictum and no court rejected it.[63] At the federal appeals level, nineteen of the twenty-three cases in the study cited and accepted the dictum and none rejected it.[64]

The Gertz dictum (see Table 1) was cited and accepted in 134 cases (61.2 percent). Nearly all of these cases reprinted the entire passage. Another 14 cases heavily implied acceptance of the Gertz dictum through reliance on cases that were based on the Gertz dictum. The dictum was not mentioned in 69 cases (31.5 percent).

Table 1--Citation of Gertz Dictum in Fair Comment/Opinion Cases (All Cases)

	N	%
Cited and accepted	134	61.2
Implied acceptance	14	6.4
Not mentioned	69	31.5
Other	2	0.9
Cited and rejected	0	0.0
Total	219	100.0

The Gertz dictum was cited and accepted in seventeen of the circuit appeals cases, implied in another two, rejected in none and not mentioned in four. Three of the cases in which the dictum was not mentioned were early in the study, and the fourth was in 1986 (Falwell v. Flynt, Fourth Circuit).

Table 2.--Citation of Gertz Dictum (Federal Appeals Cases)

Cited/Accepted	17
Cited/Rejected	0
Implied	2
Not mentioned	4
Total	23

Over three-fourths (76.7 percent) of the rulings in the cases were won by defendants,[65] who also won 70.6 percent of appellate rulings.[66]

Table 3.--Defendant and Plaintiff Success (All Cases)

	N	%
Defendant won	168	76.7
Plaintiff won	39	17.8
Mixed	12	5.5
Total	219	100.0

Table 4.--Success in U.S. Circuit Courts of Appeal

	N	%
Defendant wins	19	82.6
Plaintiff wins	4	17.4
Total	23	100.0

Opinion was the rationale most used by judges in the cases in the study (See Table 5). Opinion was the sole basis for rationale in 58.4 percent of the cases, compared to fair comment in only 9.6 percent of the cases. Opinion and fair comment were both reached in another 9.2 percent of the cases. At the federal appeals level, over half of the decisions (52.3 percent) relied on the opinion defense (See Table 6).

Table 5 Primary Rationale for Decision (All Cases)

	N	%
Opinion	128	58.4
Fair Comment	21	9.6
Opinion and Fair Comment	20	9.1
Not capable	7	3.2
Rhetorical hyperbole	2	0.9
Factual	20	9.1
Libelous (capable)	7	3.2
Other	14	6.5
Total	219	100.0

Table 6.--Primary Rationale for Decision (All Cases)

	N	%
Opinion	12	52.3
Fair Comment	2	8.7
Both	2	8.7
Not capable	1	4.3
Factual	1	4.3
Mixed	4	17.4
Other	1	4.3
Total	23	100.0

The distinctions judges used to distinguish between fact and opinion are presented in Table 7.[67] The Restatement test[68] (opinion is protected unless undisclosed libelous facts are implied or present) was used to distinguish a fact from an opinion in 91 of the cases (41.6 percent). The Greenbelt "test"[69] (rhetorical hyperbole) was the major distinguishing factor in 35 cases. Seven additional cases cited the Greenbelt rationale along with the Letter Carriers rationale (words spoken in certain heated situations will not be understood as factual). These seven cases were added to the Greenbelt category, making a total of 42 cases (19.2 percent). Judges in these cases decided that average readers would not understand the words literally, but would know from context that the speaker was expressing an opinion through sharp hyperbole. Thirty-three

cases in the study used the Ollman test[70] (15.1 percent). Nine of these cases cited Janklow. Because the Eighth Circuit in Janklow relied on Ollman, these nine cases were added to the Ollman category for the purposes of this study. Twenty-one of the cases (9.6 percent) turned on whether the statement was verifiable[71] or not; 21 (9.6 percent) on whether the statement was too vague[72] to establish an actionable defamation; 24 cases (11.0 percent) used the Information Control (totality of circumstances test[73]); cautious phrasing[74] was cited in 10 cases (4.6 percent). Twenty-eight fact/opinion distinctions were too separate to categorize. No rationale was given in 46 cases.

Table 7.--Fact/Opinion Distinctions (All)

	N*	% of Total Cases (219)
1. Restatement	91	41.6
2. Greenbelt/ Letter Carriers	42	19.2
3. Ollman/Janklow	33	15.1
4. Information Control/ Gregory	24	11.0
5. Verifiable	21	9.6
6. Vagueness	21	9.6
7. Cautious phrase	10	4.6
8. Other	28	12.8
14. None	46	21.0

*Total is greater than number of cases because some courts relied on more than one major fact/opinion distinction.

Table 8.--Fact/Opinion Distinctions (Federal Appeals Courts)

Restatement	3
Ollman test	3
Info. Control	1
Verifiability	1
Other 3 None	2
Mixed*	10

*Combinations of the following:

Restatement	5
Ollman	3
Info. Control	3
Greenbelt	8
Old Dominion	3
Verifiability	2
Vagueness	1

DISCUSSION

I. Is opinion protected under the constitution?

The findings of this study show an overwhelming belief by courts at all levels that opinion is protected under the constitution.

The success rate of defendants in opinion cases indicates a strong belief in the opinion privilege. Defendants won 76.7 percent of the decisions in the cases in the study overall, 84.0 percent of the trial level decisions, and 70.6 percent of the appellate decisions in the study.[75] These success rates compare closely with those found by Franklin[76] in media libel cases in general. If an opinion privilege was nonexistent, the success rate for cases involving opinion might be considerably lower than that of other libel defenses.

Another indication of the acceptance of an opinion privilege is the domination by "opinion" as the primary rationale for determining the outcome of decisions. Allegedly libelous statements in 68.5 percent of the cases in the study were considered opinion by the courts.[77]

The acceptance by the courts of the Gertz dictum, which states that "there is no such thing as a false idea,"[78] is another indicator of the existence of an opinion privilege. The dictum, which states that even the most pernicious opinions must be corrected "not on the

conscience of judges and juries but on the competition of other ideas,"[79] was accepted through citation or implication[80] in more than two-thirds (67.6 percent) of the cases. Although it was not mentioned in nearly one-third of the cases (31.5 percent), no court in any case rejected the dictum.[81]

The findings at the federal appeals court level indicate the wide acceptance of the opinion privilege throughout the country. Defendants won 82.6 percent of the cases at the federal appellate level.[82] Opinion was the major rationale in fourteen of the twenty-three cases in the study (60.9 percent).[83] The Gertz dictum was either cited and accepted or implied in nineteen federal appeals court decisions and rejected in none.[84] For example, [then] Judge Anton Scalia,[85] in a Fourth Circuit Court of Appeals decision, wrote:

> Since opinions cannot be false, they cannot be the basis of a defamation action.[86]

The D.C. Circuit's decision in Ollman versus Evans stated:

> In Gertz, the Supreme Court seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment. . . . By [the Gertz dicta], Gertz elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment.
>
> --Ollman v. Evans (D.C. Circuit, 1984)[87]

Further evidence of the acceptance of the opinion privilege is found in the wide use of the Ollman four-factor

analysis to determine the fact/opinion distinction. The emphasis in Ollman was on the belief that Gertz established absolute protection for opinion.[88] Even though the Ollman test was first devised in 1984, it was the third most often-used test among cases in the study, which encompassed cases from 1977 to 1987. Thirty-three decisions (15.1 percent) in the study relied on the Ollman test.[89] At the federal appeals level, the Ollman test was used in six of the twenty-three cases, second only to the Restatement test, which was used in eight federal appeals decisions in the study.[90]

Finally, the U.S. Supreme Court recently has indicated support for the protection for opinion in Hepps v. Philadelphia Newspapers[91] and Flynt v. Falwell.[92] The court ruled in Hepps that private plaintiffs have to prove falsity with clear and convincing evidence in matters of public concern, thus protecting speech that cannot be proved true or false. The court in Flynt protected even outrageous parody and cited the Gertz dictum with approval.

II. If an opinion protection exists, has it usurped the common law fair comment defense in libel litigation?

The findings of this study show the predominance of the use of the opinion rationale over fair comment. Fair comment was the primary rationale in only 21 of the 219 cases. This is not surprising, considering the advantages

the constitutional privilege has over the fair comment defense. The opinion privilege, theoretically at least, is absolute, while fair comment retains the conditions that the statement be honestly made, without malice, and based on true facts stated or known and concerning a matter of public interest.

III. How do the courts define opinion and fact?

The answer to Research Question 3--How do the courts define opinion in the context of libel?--may be found in the various methods judges use to determine whether allegedly libelous statements are facts or opinion. Seven principal approaches to the fact-opinion distinction were classified. (See Table 5): Restatement, Greenbelt-Letter Carriers, Vagueness, Verifiability, Cautious phrasing, Totality of Circumstances Test, and the Ollman-Janklow Four-Part Test.

The Restatement rationale was the primary factor for the fact/opinion distinction in 91 cases in the study (41.6 percent).

The Nevada Supreme Court used the Restatement test to decide against a television station in Nevada Broadcasting v. Allen[93] During a call-in talk show, the host reported that a gubernatorial candidate's check to the television station for political advertising had been returned. "We found out that check wouldn't clear today," the host said. "If the candidate doesn't pay his political bills, what is he going to do with state money?"[94] The court determined

that the second statement was opinion but that it was based on the "factual statement that [the candidate] did not pay his bill."[95] The underlying facts were given but wrong. The court affirmed a jury verdict for the candidate but reduced the general damages award from $675,000 to $50,000.

The New York Court of Appeals also used the Restatement test in Silsdorf v. Levine.[96] An open letter written by a political group characterized the mayor as "corrupt," stating that "it pays to do business with the mayor."[97] The court said that the statements were "susceptible to interpretation as defamatory facts by the average reader," who may interpret the statements as corruption in office. The court reversed a lower appeals court and reinstated a trial court order denying the defendant's motion to dismiss. The court reasoned:

> The complained of statements, although constituting opinions and therefore entitled to a measure of constitutional protection, may nevertheless form the basis for a defamation claim, inasmuch as plaintiff has alleged that the facts set forth by defendants in support of their opinions are false.[98]

The Ninth Circuit Court of Appeals in Lewis v. Time,[99] used the Information Control analysis to conclude that Time magazine was expressing protected opinion when it named attorney Jerome Lewis as an example of one of the legal profession's "shadier practitioners." Lewis was practicing law despite judgments against him for fraud and malpractice. Applying their own three-part test, the judges

determined that first, "the facts surrounding the publication weigh in favor of opinion, rather than fact."[100] Although Lewis argued that the article was held out as a factual account, not belief or opinion, the court said that "the article did not purport to dissect in detail Lewis's qualifications or lack thereof to practice law."[101] The article was a critical overview of the legal profession, the court said, and the mention of Lewis on the article's fifth full page "clearly meant to particularize the story's point that there may be good reason for Americans to be cynical about lawyers."[102]

Applying the second Information Control factor, the court said that the context was not necessarily a "public debate" or "heated labor dispute," but represents one of the "other circumstances" listed in the test.[103] "The Time article did not vilify Lewis through "epithets" or "fiery rhetoric," but "efforts...to persuade others" do not always have to be so emotional."[104] The judges said they read the inference that Lewis is so shady that he is subject to bar discipline "as an attempt by Time to impart some specificity to its charges against the profession."[105] The section of the article is "an effort to persuade readers first, that Lewis should be disciplined, and second, that lawyers in general should be faulted for permitting attorneys like Lewis to practice without censure."[106]

Applying the third Information Control factor, the

court said that the test "does not state that expressions of opinion may be found only in an exchange of views....Such a doctrine would too often deny constitutional protection for opinions expressed in the news media, considering "society's interest in 'uninhibited, robust, and wide open' debate on public issues.[107] Furthermore, the court said that the term "shady" is by definition "cautiously phrased in terms of apparency." The use of the word "shady," which the court defined as "disreputable," meant the magazine was implying that Lewis's morality or legal abilities were doubtful and is "a broad, unfocused, wholly subjective comment, not the kind of factual expression for which the Constitution permits liability to be imposed."[108]

An example of a case relying on Greenbelt is Pease v. Telegraph Publishing.[109] The plaintiff, a staff member of the Manchester Union Leader, was called the "journalistic scum of the earth" in a letter printed in another newspaper. He sued the author of the letter and the newspaper that printed it. A jury awarded him $10,000, but the New Hampshire Supreme Court ruled that the statements could not be reasonably understood as assertions of fact, citing both Greenbelt and Myers[110]. The trial court had erred in allowing the case to go to the jury because the statement "is clearly opinion,"[111] the New Hampshire Supreme Court said. If the statement was not clearly fact or opinion, the jury may decide,[112] the court reasoned. The statement

"journalistic scum of the earth" was rhetorical hyperbole, the court said, noting that, furthermore, the letter writer had used the cautious phrasing "I do feel."[113]

Although verifiability is one of the four factors of the Ollman test, some courts rely on whether a statement is capable of being proven true or false in determining the fact/opinion distinction. In Liberty Lobby v. Anderson,[114] for example, the U.S. Court of Appeals (D.C. Circuit) affirmed granting summary judgment for Jack Anderson because, said Judge Scalia, "There are no objective criteria by which the truth or falsity of these statements can be evaluated."[115]

In Chalpin v. Amordian Press[116], a magazine article by Dave Marsh referred to Edward Chalpin, manager for the late rock musician Jimi Hendrix, as "an unbelievably unscrupulous character." A New York state district court judge considered "whether the statement charges a particular wrongful act or other factual assertion whose truth or falsity can be established through evidence or whether it merely states an opinion or judgment."[117] The statement "unbelievably unscrupulous character" was not a verifiable one, the judge said, ruling that the plaintiff did not satisfy his burden of proving falsity.[118] In granting summary judgment for Marsh, the judge also noted that the issue at hand--that of musician Jimi Hendrix's career--was a public concern.[119]

An example of a case utilizing the cautions phrasing rationale is Dupler v. Mansfield Journal,[120] In the case, the Ohio Court of Appeals reversed a jury award of $149,000 to a police officer who had sued the newspaper over a statement in an editorial. The editorial attributed an alleged misinterpretation of the law to police. The appellate court considered that the underlying facts had been published in two related news stories and also that at least two instances of cautious phrasing had been utilized. The editorial appeared below the boldfaced heading "Opinion," the court noted, and the phrase "It seems to us" prefaced the allegedly libelous statement. Such cautious phrasing "clearly labels what follows as editorial opinion," the court said.[121]

A vagueness case is the Buckley case, in which a writer in his book on the political right in the United States accused columnist and author William F. Buckley, Jr., of being a "fellow traveler" of "fascists."[122] The Second Circuit held that the use of such expressions "cannot be regarded as having been proved to be statements of facts, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate...."[123]

In a case in this study--Shop Called East v. KYW[124]--a federal district court in New Jersey granted summary judgment for a television station that aired a news story

calling the plaintiff business a "head shop" where customers "freely" spent money "behind beaded curtains" and bought "drug paraphernalia." Calling a place a head shop, the court said, is "an inference, the application of a colloquial characterization to observable, and in this case, depicted facts."[125]

In reply to the shop owners' claim that the store was a legitimate business that sold gifts and novelties, the judge said, "It is not plausible to derive defamatory meaning out of such a semantic quibble."[126]

The Missouri Supreme Court used the vagueness standard in affirming a lower court decision favoring the defendant in Henry v. Halliburton.[127] The defendant, a president of an insurance underwriters' association, wrote in the association's publication that insurance agents who followed a particular practice sought to "fleece consumers for their own personal gain" and that such an agent is "a fraud and a twister."[128] Such language, the court held, is too "broad" and "unfocused" to sustain a cause of action in a libel suit.[129]

The four-factor test devised by Judge Kenneth Starr in the 1984 Ollman v. Evans[130] decision combines many of the single-factor criteria discussed above. The case arose from the publication of a syndicated column by Rowland Evans and Robert Novak in May 1978 concerning the candidacy of Bertell Ollman as chairman of the government department at the

University of Maryland. Ollman at the time was a professor of political science at New York University. In a column entitled "The Marxist Professor's Intentions," Evans and Novak stated that Ollman's writings "avow his desire to use the classroom as an instrument for preparing what he calls 'the revolution'; "he is widely viewed in his profession as a political activist"; he is "an outspoken proponent of 'political Marxism'"; [referring to Ollman's principal work] [s]such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession, but is a pure and simple activist,'" he said.[131]

Judge Starr based his four-part test on three U.S. Supreme Court cases--Gertz, Greenbelt, and Letter Carriers, and also two circuit court decisions--Information Control and Buckley.[132] He listed four factors to evaluate allegedly defamatory statements:

1. Analyze the common usage or meaning of the specific language of the challenged statement to determine whether the statement "has a precise core of meaning for which a consensus of understanding exists, or, conversely, whether the statement is indefinite and ambiguous." He cites Buckley for this.[133] The judge reasoned that readers are less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning.[134]

2. Consider the statement's verifiability--"is the statement capable of being objectively characterized as true or false?"[135] Judge Starr reasoned that "insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content."[136] Furthermore, the judge or jury that determines the facts in a defamation action will have difficulty assessing the truth of an unverifiable statement "based on anything but speculation."[137] He cites Hotchner v. Castillo-Puche.[138]

3. Consider the full context of the statement--for example the entire article or column. The judge reasoned that "other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content."[139] He relies on Greenbelt and the Restatement (Second) for this.

4. Consider the broader context or setting of the statement. "Different types of writing have...widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."[140] He cites Letter Carriers for this.

Applying the four-part analysis to the facts of Ollman v. Evans, Judge Starr, writing for the majority, found that the column was not libelous to Ollman. Turning first to the context of the article--factors three and four of the test--

he noted that the article appeared on the op-ed page and in the form of a political column which contained cautionary language.[141] The authors made it clear they were venting their views rather than setting forth definitive conclusions and phrased many of the issues in the form of questions.[142] Such contextual matters clearly alerted readers that the statements were opinion, Judge Starr reasoned. Then he turned to the language of the challenged statements. The one "most clearly" opinion is "[Ollman] is an outspoken proponent of political Marxism." Like the characterization "fascist" in Buckley v. Littell, the court said, "this is unmistakably a "loosely definable, variously interpretable statement of opinion. . . made inextricably in the context of political, social or philosophical debate. It is obviously unverifiable."[143] Because Ollman concedes he is Marxist, the trier of fact would have "the dubious task of trying to distinguish `political Marxism' from `non-political Marxism,' whatever that may be."[144]

The statement that Ollman "is widely viewed in his profession as a political activist"--is also not a factual assertion, because "political activist," like "political Marxism" is "hopelessly imprecise and indefinite," Judge Starr said. "It is difficult to imagine, much less construct a means of deciding that the quantum of political activity justifying the label `activist,'" he said.

The statement that the judges of the D.C. Circuit

could least agree on[145] was the quotation in the column from an anonymous professor who said, "Ollman has no status within the profession but is a pure and simple activist."[146] Judge Starr wrote in the opinion that "a confluence of factors" led the judges to decide that the statement is protected opinion.[147] First, the context of the statement in a column on an op-ed page indicates to readers that the remark is opinion. Second, the thrust of the column, taken as a whole, is to raise questions about Ollman's scholarship, not to "state conclusively from Evans' and Novak's first-hand knowledge that Professor Ollman is not a scholar or that his colleagues do not regard him as such."[148] The columnists offer enough information that Ollman did in fact enjoy considerable status (by reporting his nomination by the search committee, for example, and that his imminent ascension was troubling only to a minority of academics), that the charge of "no status" in this context "would appear to the average reader to be 'rhetorical hyperbole' within the meaning of Greenbelt, and to which in turn would lead the reader to treat the statement as one of opinion."[149]

The Second Circuit Court of Appeals applied the Ollman four-factor test in Mr. Chow v. Ste Jour. Azur S.A.[150]. In overturning a $25,000 jury verdict, the court ruled that statements in a book's review of a Chinese restaurant that indicated that sweet and sour pork "contained more dough

than meat," that green peppers "remained still frozen on the plate," that rice was "soaking in oil," that pancakes were "the thickness of a finger," and that "it is impossible to have the basic condiments on the table" were protected statements of opinion.[151]

Like the Ollman court, the Second Circuit in Mr. Chow considered context first, recognizing that reviews are normally conveyors of opinion. "Restaurant reviews are also the well recognized home of opinion and comment," the court said. "The natural function of the review is to convey the critic's opinion of the restaurant reviewed. . . . The average reader approaches a review with the knowledge that it contains only one person's views of the establishment . . . and "as is essential in aesthetic criticism . . . the object of the judgment is available to the critic's audience."[152]

Turning to the language used in the review, the court claimed that the writer's words would clearly be protected if he had said: "I found it difficult to get the basic seasonings on my table. The sweet and sour pork was too doughy for my tastes. The green peppers served with the pork were not hot enough. The fried rice was too oily. And the pancakes served with the Peking Duck were too thick." The writer's use of metaphors and hyperbole did not turn his comments into factual statements, the court said.[153]

Noting that the protection for exaggeration or

hyperbole stems from the Supreme Court's Greenbelt decision, the court said such exaggerations "are clearly an attempt to interject style into the review rather than an attempt to convey with technical precision literal facts about the restaurant."[154] The author obviously thought the service was bad, the pork too doughy, etc., and the average reader would understand the statements to be opinion, the court said, concluding, therefore, that "the statements are entitled to the same constitutional protection as a straight-forward expression of opinion would receive."[155]

Five of the six contested statements are incapable of being proved true or false, the court ruled, applying a third Ollman factor. The critical statements about the quality of food and service at Mr. Chow's are verifiable only if taken literally, the court said. "As we have just concluded however, a reasonable reader would not take these statements literally. Read reasonably, the statements are incapable of being proved false. . . . "What is too oily for one person may be perfect for some other person."[156]

The court said the only statement capable of being verified was that the traditional Peking duck consisted of one rather than three dishes. Because no evidence was presented showing the reviewer had actual malice in making the statement, and because the other statements were ruled to be opinion, the court ordered the case dismissed.[157]

RECOMMENDATIONS

Because this area is so fluid, further study is needed. Duplication of this study would be valuable because such systematic surveys of areas of law are rare. A refinement of definitions and methodology would be helpful for studying this and other areas of law. This study did not address fault standards applied in opinion cases, although several perplexing and contradictory applications of the actual malice standard were discovered in the cases. These applications need to be analyzed further. Another potential gold mine for study is the area of communication effects as they apply to libel law. For example, judges in many of the cases in this study assume powerful effects of the media.[158] They do not take into account that people may not accept all messages written or spoken, yet this has always been the underlying assumption behind libel law.

Journalists who must wade daily through the mine field of potentially libelous expression of opinion should note the hazards in this subjective area of libel litigation. Although a protection for opinion is being recognized by most courts, the definition of opinion varies and the tests applied to determine if a statement is libelous also differ. What may be considered clearly protected opinion in one jurisdiction may be considered libel in another. Furthermore, because of the subjectivity of the tests

themselves, their application within jurisdictions even to similar fact situations may differ greatly.

As a practical matter, journalists should study the opinion privilege as it is being applied by courts in their region. Journalists might do well to consider two major factors in establishing guidelines for everyday use:

1. What is the context of the publication or broadcast?

If the statements concern a matter of public interest, even private individuals will have difficulty winning a libel suit. Public figures and officials often sue in such cases, but the success rate for plaintiffs in the area of opinion is extremely low. Matters of public interest are broadly defined. If the statements are part of a heated public exchange such as a labor dispute or other controversy in which people tend to use abusive language or exaggerate for effect, the statements are likely to be considered opinion.

Any other contextual clues that cause readers to believe that a statement is opinion rather than fact often, though not always, influence judges in their determination. These clues include the location of the article in the publication, the nature of the publication, the tone of the publication, other literary devices employed by the writer to influence the audience, and cautionary language.

2. What is the nature of the words in the allegedly libelous statement?

Do people agree on the definitions of the specific words, or might they mean different things or nothing to many people? Is the language being used in a figurative sense? Can the truth or falsity of the words be proven in court? Language that cannot be readily defined or verified as to its truth or falsity often is considered to be opinion. If the nature of the language is evaluative or judgmental in nature--usually considered to be nonprovable because it is "true" only to the speaker--are the facts underlying the evaluation or judgment stated or commonly known? This study found the existence or nonexistence of the facts underlying a derogatory opinion of utmost concern to judges. Judges often determine that even the most caustic opinions are protected if the underlying facts are given or well known.

It is difficult to predict which one factor of the many presented in this study judges will consider over another. For example, a judge in one case may base her entire decision on the fact that the statement appeared on the editorial page of a newspaper. Another judge may decide that the language of the article is more important than its location. This seemingly haphazard application of the existing standards for determining the fact/opinion distinction is a major reason why the distinction is a

dangerous one to administer as far as freedom of expression is concerned.

The Supreme Court may burn off the fog that hovers over this portion of the libel landscape by providing a definition of protected opinion. Short of this, however, it is important to realize that the court has begun to move toward just such an elucidation. Lower courts, too, have accepted the protection, but even though opinion cases are won overwhelmingly by defendants and mostly at pre-trial stages, the average adjudication time is four years. Such a time frame may encourage some editors to steer wide of sharp comment and expound only moderate ideas acceptable to large groups of people. Judges must realize that their position in ensuring a climate for "uninhibited, robust, and wide-open"[159] debate on public issues requires them to "tip the scales . . . to ensure that true speech on matters of public concern is not deterred," as Justice Sandra Day O'Connor wrote in a 1986 libel case.[160] Speech which is not demonstrably true or false about a matter of public concern must be protected even at the risk of harming an individual's reputation.

NOTES

1. Roth v. United States, 354 U.S. 476, 484 (1957).

2. New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

3. Ibid, 270.

4. The dissertation from which this paper is taken includes more extensive historical background on fair comment and privilege in general. Other parts of this paper, including the findings, are considerably summarized versions of the original. Contact the author for complete results.

5. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

6. Ibid.

7. Ibid., 339-40, quoting New York Times v. Sullivan, 376 U.S. 254, 270.

8. The Gertz passage was cited and accepted in 61.2 percent of the cases in this study. See Table 1.

9. Miskovsky v. Oklahoma Publishing Co., 654 P. 2d 587 (Okla.), cert. denied, 459 U.S. 923 (1982), at 925. See note 39 below.

10. The dictum was cited in Bose and Flynt. See pp. 8-10. In Hepps, the court may have ensured the dictum's acceptance by requiring that even private plaintiffs involved in a public issue must prove the falsity of alleged libelous statements.

11. For descriptions of formulas and tests used by the courts, see p. 15 below and notes 68-74.

12. Robert D. Sack, Libel, Slander, and Related Problems (New York: Practising Law Institute, 1980), 155.

13. New York Times, at 279, quoting Speiser v. Randall, 357 U.S., at 526.

14. Robert Sack, for example, states: "No task undertaken under the law of defamation is any more elusive than distinguishing between the two." See Sack, 155.

16. See, for example, Herbert W. Titus, "Statement of Fact Versus Statement of Opinion--A Spurious Dispute in Fair Comment, 15 Vanderbilt Law Review 1203 (1962).

17. Frederick Schauer, "Language and Truth," 64 Virginia Law Review, 169.

18. Ibid.

19. Ibid., 301.

20. Ibid., 157.

21. Ibid.

22. Robert Webner, "The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule," 72 Georgetown Law Journal, 1786 (1984).

23. Franklin and Bussel supra, 874.

24. Herbert W. Titus, "Statement of Fact Versus Statement of Opinion--A Spurious Dispute in Fair Comment," 15 Vanderbilt Law Review 1203 (1962).

25. Ibid., 877-78.

26. Franklin and Bussel, 855.

27. 376 U.S., at 280.

28. Rodney A. Smolla, Suing the Press (New York: Oxford University Press, 1986), 53.

29. Systematic, quantified studies in law are rare. Three significant projects include two by Marc Franklin: "Winners and Losers and Why: A Study of Defamation Litigation," 1980 American Bar Foundation Research Journal 455 (1980), and "Suing for Libel: A Litigation Study," 1981 American Bar Foundation Research Journal 754 (1981); as well as the Iowa libel research project: Randall P. Bezanson, Gilbert Cranbert, and John Soloski, Libel Law and the Press (New York: The Free Press, 1987).

30. Published by the Bureau of National Affairs, Inc.

31. Opinion/fair comment cases are defined as those listed under section 11.45 ("Defamation--"Fair Comment," and 11.452, "Defamation--Privilege--Fair Comment/Opinion." Until September 1979, with the beginning of the fifth volume of Media Law Reporter, section 11.45 was designated as that containing "fair comment" cases. Beginning with Volume 5,

however, Section 11.452 has carried the dual label "Defamation--Privilege--Fair Comment/opinion." The Media Law Reporter began publication in 1976 and attempts to publish all cases in state and federal courts involving the media. The total number of cases read for the study was 220. One case was not used because it did not involve the fair comment or opinion defense, but appeared to be mis-categorized.

Data from the 219 cases in the population were collected and tabulated in two major steps. First, the cases were read and data collected on a case form. Second, the contents of the case form were coded and tabulated on a grid.

Many of the cases involved several possible causes of action besides libel, such as privacy and emotional distress. In the area of libel, many cases were based on multiple allegations of libel through various statements. For the purpose of this study, only those causes of action directly relating to the fair comment/opinion doctrine were included in the data.

Besides the data shown below in Tables 1 through 5, the following information was gleaned from each case and tabulated: type of court, amount of time between original statement and court decision, plaintiff status, defendant status, libel basis, immediate context, broad context, case outcome.

32. 376 U.S. 254 (1964).

33. The right of fair comment, developed by the common law beginning in the early nineteenth century, was used to justify critical reviews of books, plays, and other public offerings, including governmental affairs. The privilege evolved from the necessity to protect statements that, although they could not be proven true, still might contribute to public discussion. Fair comment developed as a conditional privilege, meaning that certain conditions had to be met before the privilege was in effect. Those conditions were: the subject of the comment had to be a matter of public concern, the comment had to be based on true or privileged facts stated at the time or known or available to the public, and it had to represent the author's actual opinion and could not be made with malice.

The majority of states under the common law said that the courts must grapple with the matter of what is fact and what is opinion and that if the derogatory comment were judged to contain false facts or be based on false facts, there was no protection. But a minority of states--about 25 percent--held the view that even false facts accompanying the opinion were protected if they were published with an honest belief in their truth and without malice.

34. 398 U.S. 6 (1970).

35. 418 U.S. 264 (1974).

36. Protection for language of emotion and figurative expression also was guaranteed by the Supreme Court in another case about the same time as Greenbelt. In Cohen v. California (403 U.S. 15 (1971)), the "Fuck the Draft" case, the court said:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Though Cohen is not a libel or a factual case, it is relevant in the development of Supreme Court doctrine for the opinion privilege, because it extends constitutional protection to the overall message or intent of the statement, rather than merely the language expressed.

Protection for opinion also may be seen in the Supreme Court's decision in Time v. Pape (401 U.S. 79 (1971)). Time magazine reported as a charge by the U.S. Commission on Civil Rights what was a description by the Commission of the allegations in a complaint filed by a plaintiff in a civil rights action. The Supreme Court said that any time a press report departs from full direct quotation of the words of the source, publishers are inevitably confronted with a set of choices. "Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities." The deliberate choice of such an interpretation, even if it were arguably a misconception, was not enough to create a jury issue of actual malice, the court said. "To permit the malice issue to go to the jury because of the omission of a word like 'alleged,'. . . would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact." The court added that such misstatements--errors of interpretation--have the protection of the First Amendment.

37. 418 U.S. 323 (1974).

38. See Gertz dicta quoted on p. 1.

39. In Miskovsky v. Oklahoma Publishing Co. (654 P.2d 587 (Okla.), cert. denied, 459 U.S. 923 (1982)), the court let stand a dismissal of a libel case on the grounds that the contested statement was opinion and thus protected speech under the First Amendment. The state supreme court had affirmed the trial court's decision, which cited the Gertz dictum. Justice William Rehnquist, joined by Justice Byron White, said in the dissent that the Oklahoma court had not adequately considered whether opinions were protected by the First Amendment. Rehnquist noted that the state court had relied upon the Gertz dictum, and he argued that the problem of defamatory opinion was not remotely an issue in Gertz. In the Gertz opinion, "there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem," said Justice Rehnquist, adding, "I am confident the Court did not intend to wipe out this rich and complex history with the two sentences of dicta in Gertz. (Ibid., at 925.) Ironically, Chief Justice Rehnquist quoted approvingly from the Gertz dictum in a later case. See Hustler Magazine and Flynt v. Falwell, 99 L.Ed. 2d 41 (1988), and discussion below.

40. 466 U.S. 485 (1984).

41. 475 U.S. 767 (Preliminary Print).

42. 99 L.Ed.2d 41.

43. Ibid., at 768-769. The court previously had determined that public officials and figures had to bear the burden of proving falsity. See discussion above under New York Times.

44. Ibid., at 776.

45. Ibid, at 776.

46. Ibid.

47. Ibid.

48. Ibid., at 776-77.

49. Ibid. at 778.

50. Ibid., at 778, quoting Gertz, 418 U.S. at 341.

51. Ibid., at 778.

52. Ibid.

53. See Marc Franklin and Daniel Bussel, 25 William & Mary Law Review 825.

54. Flynt v. Falwell, 99 L.Ed.2d 41.

55. Ibid., at 47.

56. See note 39 supra.

57. Ibid.

58. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

59. Ibid., quoted in Flynt, at 49.

60. Ibid., at 52.

61. Ibid., quoting Street v. New York, 394 U.S. 576, 592 (1969).

62. Ibid., at 52.

63. See Table 1.

64. See Table 2.

65. See Table 3.

66. See Table 4. Summary judgment was the ruling in 66 percent of the cases in trial courts. However, even though most of the cases were resolved before the trial stage, the average length of time between the date the alleged libels occurred and the rulings in the cases in this study was four years.

67. Because some courts relied on more than one fact/opinion distinction, the number of distinctions in Table 7 is greater than the number of cases.

68. For the purposes of this study, what is known as the Restatement "test" is the application to a case of the definition of a defamatory opinion in the Restatement (Second) of Torts. The portion of the Restatement often cited by judges that best describes the "test" states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed

defamatory facts as a basis for the opinion.

In other words, an opinion may be actionable if it is based on undisclosed defamatory facts. This is considered a "mixed" opinion by the Restatement. A "pure" opinion is one based on stated or readily available facts and is not actionable.

69. Greenbelt "Test": The U.S. Supreme Court held in Greenbelt v. Bresler that the word "blackmail" in articles reporting a public controversy would not be taken as an accusation of a crime, but as rhetorical hyperbole in the context of a heated debate. "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable," the court said."

70. The Ollman test (taken from Ollman v. Evans, 750 F.2d 970, 979-84 (1984)), includes four factors to be analyzed in determining whether a statement is fact or opinion: (1) the common usage or meaning of the specific language; (2) the statement's verifiability; (3) its immediate or literary context; and (4) its broader or social context.

71. Verifiability Factor: Cases using verifiability as a major rationale for determining the fact/opinion distinction were included in this factor. Verifiability refers to whether the allegedly libelous statement is capable of being proven true or false. Verifiability is one of the four factors of the Ollman test discussed below, but cases relying on the Ollman test are not recorded here.

72. Vagueness: The test for vagueness as a fact/opinion distinction is whether the language of allegedly libelous statements has a "precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous." This rationale is one of the four factors in Ollman, but courts not citing Ollman also apply the vagueness standard. Buckley v. Littell (539 F 2d 882), a judgment from the Second Circuit Court of Appeals, is often cited as a precedent. The court said that statements that are "loosely definable" or "variously interpretable" cannot in most contexts support an action for defamation. The reasoning behind the vagueness factor is similar to that of verifiability because words with vague or debatable meanings are difficult to prove true or false.

73. Totality of Circumstances Test: The Ninth Circuit Court of Appeals devised a three-part test to determine whether a statement was opinion or fact. Known as the "Information Control" test, the court said three factors should be analyzed:

(1) the facts surrounding the publication--"words are not defamatory unless they are understood in a defamatory sense.... Thus, the words alone are not determinative; the facts surrounding the publication must also be considered."

(2) the circumstances--"even apparent statements of fact may assume the character of statements of opinion and thus be privileged when made in public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole....'"

(3) the language itself--"Where the language of the statements is 'cautiously phrased in terms of apparency' or is a kind typically generated in a spirited legal dispute in which judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums, the statement is less likely to be understood as a statement of fact rather than as a statement of opinion."

74. Cautious Phrasing: Cautious phrasing is one of the three factors in the Information Control test and a consideration under the third factor of the Ollman test, but courts that have not adopted either of these two multi-factor tests also use cautious phrasing as a fact/opinion distinction. The usual connotation of the term cautious phrasing is wording that tells the reader on notice that the speaker is expressing an opinion, such as "I think" or "in my opinion."

75. See Tables 3 and 4 above.

76. Franklin, "Suing Media for Libel," 802. Franklin found that both trial and appellate court rulings favored defendants in libel cases 75 percent of the time.

77. See Table 5.

78. 418 U.S. 323, 339-40.

79. Ibid.

80. See Table 1. Implied acceptance of the dictum means that a case that explicitly cited the dictum was relied on in a decision.

81. Ibid.

82. See Table 4.

83. See Table 28, p. 137.

84. See Table 2.

85. Scalia is now a justice on the U.S. Supreme Court.

86. Liberty Lobby v. Anderson (D.C. Circuit, 1984)

87. 750 F 2d 970, 974-5 (1984). Other quotations from other circuit court cases are:

> It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory.
>
> --Orr v. Argus Press, (Sixth Circuit, 1978)

> Although it is clear that expressions of opinion are constitutionally protected, the determination of whether a specific statement is one of opinion or fact is difficult.
>
> --Mr. Chow of New York v. Ste. Jour Azur S.A. (Second Circuit, 1985)

> It is settled law that statements of opinion are not actionable, Gertz 418 U.S. 323, 339-40 (1974).
> --Kaplan v. Newsweek (Ninth Circuit, 1985)

> An opinion is protected because it cannot, under Gertz, be "false." Because a statement must be false to be actionable defamation, Restatement (Second) of Torts Section 558(a) (1977), an opinion is simply not actionable defamation. It makes no difference whether the plaintiff alleging the defamation is a private or a public person.
> --Lewis v. Time (Ninth Circuit, 1983)

> Opinion is absolutely protected under the First Amendment.
>
> --Janklow v. Newsweek (Eighth Circuit, 1986)

88. See, for example, the quotation from Ollman above at Note 87 that explicitly endorses the belief that Gertz established the opinion protection.

89. See Table 7.

90. See Table 8. Also, tThe LDRC 50-State Survey reported in 1987 that thirty-seven states have a "constitutional opinion privilege recognized under Gertz." Four states recognize an opinion privilege under common law as "fair comment." Five states have an opinion privilege under common law in matters of "public interest" involving "public officials." Fourteen states have not addressed the issue.

91. 475 U.S. 767.

92. 99 L.Ed. 2d 41.

93. 9 MLR 1769 (1983).

94. Ibid., 1769.

95. Ibid., 1773.

96. 9 MLR 1815 (1983).

97. Ibid.

98. Ibid., 1816.

99. 710 F 2d 549, 554-56 (1983).

100. Ibid., 553.

101. Ibid.

102. Ibid.

103. Ibid.

104. Ibid., 553-54.

105. Ibid., 554.

106. Ibid.

107. Ibid., quoting Gertz, 418 U.S. at 340, quoting New York Times, 376 U.S. 254, 270. Emphasis added.

108. Ibid. (Lewis, 554).

109. 7 Med.L.Rptr. 1114 (1981).

110. Myers v. Boston Magazine, (Mass. Sup. Jud.C. 1980), 6 MLR 1241.

111. Pease, ibid., 1116.

112. Ibid. Emphasis added.

113. Ibid.

114. 746 F 2d 1563 (1984).

115. Ibid., 1572.

116. 12 Med.L.Rptr. 1422 (1985).

117. Ibid., 1424.

118. Ibid.

119. Ibid.

120. 5 Med.L.Rptr. 2259 (1979).

121. Ibid., 2274.

122. Ibid., 887.

123. Ibid., 894.

124. 8 Med.L.Rptr. 1399 (1982).

125. Ibid.

126. Ibid., 1403.

127. 11 Med.L.Rptr. 2185 (Mo. Supreme Court, 1985).

128. Ibid.

129. Ibid.

130. 750 F 2d 970 (1984). The four-part test is on pp. 979-984 [11 Med.L.Rptr. 1433].

131. Ibid., 472-3.

132. All of these cases are discussed above.

133. Ibid., 979-80.

134. Ibid., 980, Note 18.

135. Ibid., 981.

136. Ibid.

137. Ibid.

138. 551 F 2d 910, 913.

139. Ibid., 982.

140. Ibid., 983.

141. Ibid., 986-87.

142. Ibid., 987.

143. Ibid.

144. Ibid.

145. Only three of the eleven judges concurred with Judge Starr on this portion of the opinion. See, ibid., 989.

146. Ibid.

147. Ibid., 990.

148. Ibid.

149. Ibid.

150. 759 F 2d 219 (1985).

151. Ibid., 222.

152. Ibid., 227-28.

153. Ibid., 229.

154. Ibid.

155. Ibid.

156. Ibid.

157. Ibid., 230-31.

158. John Shipman studied judicial perception of media effects in obscenity and free press-fair trial cases. See "Federal Appellate Courts' Perception of the Power of

Mass Media in Free Press-Fair Trial and Obscenity Cases," Ph.D. dissertation, University of Missouri, 1988. Shipman concluded in his study that the U.S. Supreme Court and the federal circuit courts of appeal have generally perceived the mass media to have powerful effects on human behavior and society. However, he found that in the past twenty years the courts have begun to perceive the mass media as having more moderate effects because the courts likely are becoming more comfortable with electronic media and have begun to recognize multiple factors that might mitigate media effects.

159. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

160. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776-7.